No. 2968

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DEXTER HORTON TRUST & SAVINGS BANK, *Appellant,* *vs.* THE COUNTY OF CLEARWATER OF THE STATE OF IDAHO, and OREN D. CROCKETT, as Treasurer of Said County, *Appellees.*	No. 2968.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF IDAHO, CENRAL DIVISION.

Appallant's Reply Brief

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CORRECTION OF THE RECORD.

We desire to call the court's attention to an error in printing. On page 273 of the record there is a reference to prior pages of the record. These prior pages are referred to as pages 41, 42 and 43.

These are the pages of the typewritten transcript and the printer neglected to change the figures to indicate the proper pages of the printed record. The reference should be to pages 263, 264 and 265.

I.

We shall first notice appellees' argument in support of the claim that the law prohibits the employment of private parties to do the work which was performed by Nease.

(a) The proposition advanced by the appellees is that the cruising must be done, if at all, by the assessor. It is sought to sustain this proposition on the principle that the county commissioners have no power to hire private parties to perform the official duties which the law has specifically imposed upon an elective officer. And the argument of the appellees is that, if cruising of timber lands is necessary, it is therefore a part of the official duties imposed by law upon the assessor.

This argument wholly ignores the distinction between the assessing of property and furnishing to the assessor information which enables him to do the assessing. That the mere furnishing to the county of information to enable the assessor and the board of equalization properly to assess lands

is not either listing or valuing the lands is perfectly clear. If the assessor, having no knowledge as to the amount of timber upon a section of land, and desiring to procure such knowledge, applies to a person who has that knowledge and procures it, can it be said that the person who furnishes such information to the assessor thereby usurps the functions of the assessor? What Nease did was to procure information of the amount of timber upon lands in the county and furnish it to the county. Can it be said that when he had done this, that his reports filed with the county were a listing, or valuation, or any other part of the assessment, of the lands? Nease did not determine what lands should be listed, nor how they should be listed nor classified, nor how they should be valued. That duty was left entirely to the assessing officers, where the law placed it, and in performing this duty they make use of such information as he furnished them.

(b) Appellees make the claim on page 82 of their brief that the board of equalization has no authority to compel the assessor to substitute its opinion for that of the assessor. If this were true, it would not alter the case. But, as a matter of fact, the board of equalization does have the power to change the assessment made by the assessor.

(See sections 58 and 62 of the statute quoted on page 131 of the appellant's brief.)

And the Supreme Court of Idaho has held that the conferring of this power upon the board of county commissioners is not in conflict with the constitution of Idaho.

> *Murphy vs. Board of Commissioners,* 59 Pac. 715.

To support their position in this regard the appellees rely upon the case of *Blomquist vs. Board of County Commissioners,* 25 Idaho 292 (S. C.) 137 Pac. 174. This case holds that, under the constitution of Idaho, the power of assessing property is vested in the county assessor, and the county commissioners sitting as a board of equalization; and that the legislature cannot deprive them of this power by vesting it in a new body, created by the legislature and known as the Tax Commission. It recognizes that the board of county commissioners, sitting as a board of equalization, constitutes, under the constitution, a part of the assessing authority of the county. And it could not well do otherwise, in view of article seven, section twelve, of the constitution, which declares:

> "The board of county commissioners for the several counties of the state shall constitute boards of equalization for their respective

> counties, whose duties it shall be to equalize the valuation of the taxable property in the county, under such rules and regulations as shall be prescribed by law."

Therefore, the action of the county commissioners, in procuring the cruise of timber lands, is for the purpose not only of enabling the assessor properly to perform his duties, but also to enable the board itself, when sitting as a board of equalization, properly to perform its functions.

(c) Appellees seek to distinguish the case of *Pacific Timber Cruising Company vs. Clarke County, Wash.,* 233 Federal, 540. They claim that a ground for distinction lies in the fact that under the laws of the State of Washington the county commissioners are the chief executive officers of the county and the management of the county's business is vested in them by law.

There is no essential difference in this regard between the laws of Washington and the laws of Idaho. Sections 1898, 1899, 1901 and 1917 (22), volume I, of Idaho Revised Codes, are as follows:

> "Section 1898. Every county is a body politic and corporate and as such has the power specified in this title or in other statutes, and such powers as are necessarily implied from those expressed."
>
> "Section 1899. Its powers can only be ex-

ercised by the board of county commissioners, or by agents or officers acting under their authority, or authority of law."

"Section 1901. It has power, (1) to sue and be sued; * * * (5) to levy and collect such taxes for purposes under its exclusive jurisdiction as are authorized by law."

"Section 1917. * * *

22. To do and perform all other acts and things required by law not in this title enumerated, or which may be necessary to the full discharge of the duties of the chief executive authority of the county government."

Sections 3822, 3824 and 3890, volume II, of Remington and Ballinger's Codes of Washington, are as follows:

"Section 3822. The several counties in this state shall have capacity as bodies corporate to sue and be sued in the manner prescribed by law; to purchase and hold lands within its own limits; to make such contracts, and to purchase and hold such personal property, as may be necessary to its corporate or administrative powers, and to do all other necessary acts in relation to all the property of the county."

"Section 3824. Its powers can only be exercised by the county commissioners, or by agents or officers acting under their authority or authority of law."

"Section 3890. * * *

6. To have the care of the county property and the management of the county funds and business, and in the name of the county to

> prosecute and defend all actions for and against the county, and such other powers as are or may be conferred by law."

It is not practicable to set out here in full all the statutes of the state of Idaho and the state of Washington in regard to the powers of county commissioners, but the above is sufficient to show that the whole management of county affairs, except in so far as has been vested in other officials, rests in the board of county commissioners to as full an extent under the laws of Idaho as under the laws of Washington. A more detailed examination of the several statutes makes this fact even more apparent. (See Sec. 1917 *et seq.*, Vol. I, Idaho Rev. Codes; Sec. 3890 *et seq.,* Rem. & Bal. Codes of Washington.)

In further attempt to distinguish the *Pacific Timber Cruising Company* case, 233 Federal, 540, the appellees rely upon the case of *Gen. Custer Mining Co. vs. Van Camp,* 2 Idaho, 40, (S. C.) 3 Pac. 22. In the latter case, the Supreme Court of Idaho held that a statute giving the right of appeal from decisions of the board of county commissioners did not authorize an appeal from that board when sitting as a board of equalization; because the board of county commissioners, when sitting

as a board of equalization, is acting in an entirely different capacity from that in which it acts when sitting as a board of county commissioners, as such. This decision affords no basis for a distinction between the laws of Idaho and the laws of Washington, for the Supreme Court of Washington has decided the same thing in the case of *Olympia Water Works vs. Thurston County,* 14 Wash. 268 (S. C.) 44 Pac. 267. In fact the Supreme Court of Idaho, in the later case of *Felthan vs. Board of County Commissioners,* 77 Pac. 332, in reaffirming its decision in the case of *General Custer Mining Company vs. Van Camp,* makes extended reference to the decision of the Supreme Court of Washington, in the *Olympia Water Works* case, *supra,* as a parallel case. When the Supreme Court of Washington rendered this opinion, the board of county commissioners constituted the board of equalization.

It is difficult to perceive how the fact that the board has this dual capacity is of any significance. However, at the time when the decision was rendered by the United States District Court of Washington, in the *Pacific Timber Cruising Company* case, the difference between the board of county commissioners as such and the board of equalization

was more marked in the State of Washington than in the State of Idaho, for the Washington statute then and now in force does not make the board of county commissioners alone the board of equalization, as is shown by Section 9200, Volume two of Remington and Ballinger's Codes of Washington, which provides as follows:

> "The county commissioners, the county assessor and the county treasurer, or a majority of them, shall form a board for the equalization of the assessments of the property of the county. * * *"

It is clear, therefore, that the fact that the board of county commissioners, when sitting as a board of equalization in Idaho, acts in a different capacity from that of a board of county commissioners, as such, affords no ground to distinguish the case of *Pacific Timber Cruising Company,* 233 Federal, 540, from the case at bar.

(d) The appellees place some reliance upon the tax commission statute, a portion of which is quoted on page 95 of their brief. Special reliance is placed upon section nine of the act, which declares, among other things, that "the commission shall prescribe a uniform system of procedure in the assessment of property. * * *" It was not the intention of this statute to confer upon the

State Tax Commission the power to control the assessing officers of the county in their assessments of the property. The power to properly classify and assess property is fixed by the constitution in the assessor and the board of equalization. The manner in which they shall discharge their duties is determined by another statute, to-wit: Chapter 58 of Session Laws of 1913, the pertinent provisions of which are set forth as an appendix to the appellant's opening brief. If the board of county commissioners and the assessor should conclude that a cruise was necessary in order to enable them properly to assess timber lands, the State Tax Commission could not prevent them from having the cruise made. This is settled by the *Blomquist* case, *supra,* 137 Pac. 175, where the Supreme Court of Idaho held that the Tax Commission is but "an advisory board."

Moreover, if it should be assumed that the State Tax Commission would have the power, in prescribing a uniform system of procedure, to tell the assessor and the county commissioners whether they should or should not have timber lands cruised, the mere existence of that power would not be pertinent, unless it should appear that the State Tax Commission had in fact made some such rule, and

that the action of the board of county commissioners in this case was contrary thereto.

II.

We next notice appellees' claim that the Nease contract is in violation of section three of article eight of the constitution of Idaho.

(a) Appellees assert that the decision of the Supreme Court of Oregon, in the case of *Wingate vs. Clatsop County,* 71 Oregon, 94 (S. C.) 142 Pac. 561, is not in harmony with the previous adjudications of that court, and especially with the case of *Eaton vs. Minnaugh,* 43 Oregon, 473 (S. C.) 73 Pac. 754. A careful examination of these cases will show that there is no conflict. As this is clearly pointed out by the Oregon court in the *Wingate* case, it is not necessary for us to do so. In an earlier case the Supreme Court of Oregon had before it the question whether certain county warrants were in violation of the constitutional inhibition against county indebtedness, and, in sustaining them, the court applied the following test:

> "It was such a service, so far as we are informed by the record, as the county could not well dispense with for the time being even, and perform understandingly and intelligently the functions pertaining to its organization."
>
> *Municipal Securities Co. vs. Baker County et al.,* 54 Pac. 174.

If this test shall be applied in this case it will sustain the validity of the warrants in question; for it cannot be denied that the assessing officers of Clearwater County could not understandingly and intelligently perform the functions pertaining to the assessment of timber lands, which duties were imposed upon them by law, without having the information which could be procured in no practical way other than by cruising. The District Court in its opinion recognized the authority of the county commissioners to incur expense in securing information to enable the assessing officers intelligently to perform these functions. (Record page 190.)

(b) It should be borne in mind, also, in considering the Oregon decisions that the inhibitions of the Oregon constitution are more stringent than those of the Idaho constitution. Under the Oregon constitution the prohibition above five thousand dollars, except for certain specified purposes, is absolute. Under the Idaho constitution, there is no limitation of the amount of indebtedness which the county commissioners may incur, if it is for an ordinary and necessary expense authorized by the general laws of the state. It was not the intention of the framers of the Idaho constitution to make the prohibition against the power of the com-

missioners to contract indebtedness absolute. It was undoubtedly their intention to leave the county commissioners free to incur whatever debts should be necessary to enable themselves and other county officers to discharge the functions which the legislature should from time to time impose upon them by law. A narrower construction of the proviso would deprive it of all meaning.

The constitution of Idaho creates but a mere skeleton of county government. Article eighteen, section five of the Idaho constitution provides as follows:

> "The legislature shall establish, subject to the provisions of this article, a system of county governments which shall be uniform throughout the state. * * *"

Section eleven of the same article is as follows:

> "County, township and precinct officers shall perform such duties as shall be prescribed by law."

The functions, duties and powers of counties and county officers are found almost wholly in the statute law. The makers of the constitution recognized that the counties are subordinate, political subdivisions of the state, that would, in the ordinary course of events, be clothed from time to time with varied functions in the administration of

the government. They also recognized that when the legislature should from time to time impose certain duties of a governmental nature upon the county officers, that the discharge of those duties ought not to be left dependent upon the vote of the people of the several counties.

Now, the legislature has seen fit to devolve upon the county governments practically the whole duty of providing revenue, not only for themselves, but for the state. These are functions which the county officers are authorized by the general laws of the state to perform. They are not only authorized but required to perform them.

The appellees argue in opposition to this view that the cruise of timber lands was not necessary to enable the assessing officers of the county to perform these functions, because it was possible for them to perform the functions in a slip-shod manner, without the information which would be afforded them by a cruise. The statute, however, requires that they shall perform these functions in a careful and competent manner. The test as to whether the expense is a necessary one is whether it is necessary to enable the county officers to perform the functions imposed upon them by law in the manner required by the law, i. e., in a proper and intelligent manner.

(c) Some point is made by the appellees, on page 87 of their brief, of the fact that a cruise of timber cannot be absolutely accurate in any event. This is no reason why the problem of procuring information in regard to timber lands should not be dealt with in a sensible and practical way. If the behest of the statute is to be obeyed, that the assesor shall determine "as nearly as practicable the full cash value" of lands, it is necessary that the information to enable him to do so shall be procured as nearly as practicable. And the fact that it may not be possible to determine the facts with absolute accuracy does not relieve the county officers of the duty of solving the problem in a practical way to the best of their judgment. The argument of the appellees is that because it is not practical for the assessing officers to get absolutely accurate information, that, therefore, they cannot procure it "as nearly as practicable."

Notwithstanding all that appellees say about the essential inaccuracy of the results of cruising timber, the fact remains that all dealing in timber lands is based upon cruises; this is common knowledge. It may be true that occasionally the results of competent cruisers will show, because of peculiar circumstances, abnormal and excessive variations,

but the merits of cruising must be determined by the normal. The normal variation should be from ten to twenty-five per cent (Record, pages 385, 427, 434). The contract between Nease and the county recognized twenty per cent as the limit of allowable variation. (See paragraph six of the contract, pages 8 and 9 of appellant's brief.) To have knowledge within eighty per cent of accuracy is certainly better than complete ignorance.

(d) Appellees insist that the expense incurred was not a necessary expense, because the work of cruising was improperly done, and, therefore, did not supply to the county as accurate information as it would have received had the work been better done. The question whether Nease properly complied with his contract can have no bearing upon the question of whether the work performed was a necessary expense. In considering the question whether a contract made by the county is or is not a necessary expense, the only question for the court is whether the thing contracted for is a thing which, under the constitution, the county commissioners have a right to procure. The question whether the quality of the work done, or article procured, is such as to adequately meet the necessity is for the county commissioners alone to deter-

mine. If the thing contracted for belongs to the class of things which are necessities under the general laws of the state, it is within the powers of the county commissioners to procure the same, and their judgment as to its quality and sufficiency cannot be reviewed by the courts. Any other construction of the constitutional provision would render it impossible for parties safely to contract any indebtedness through the commissioners, and would place the whole matter of incurring county debts for necessary expenses under the tutelage of the courts.

The county commissioners have authority to purchase stationery and other office supplies necessary for themselves and the other county officers; this is unquestionably a necessary expense. If the county commissioners should purchase stationery and books for the use of the county treasurer, could the court declare the debt thereby incurred unconstitutional because, in the opinion of the court, such stationery and books were not as adequate for the treasurer's use as they should be?

In the debates in the constitutional convention, set out in the brief of the appellees, reference is made to witness fees as a necessary expense (see page 158, appellees' brief). If, in the prosecution of

a criminal case, the county officers should procure the attendance of witnesses, and if at the trial the testimony of such witnesses should be by the court wholly excluded because either immaterial or incompetent, could the court declare that the expense incurred for the procuring of such witnesses was unconstitutional because, in the opinion of the court, such witnesses were unnecessary? *If a cruise of timber lands is necessary to enable assessing officers properly to perform their functions, then the question of what kind of a cruise will answer their purpose is for the judgment of the county commissioners, so long as that judgment is exercised in good faith.*

(e) It is stated by the appellees that there was ample time for holding of a popular election. This is immaterial, for we are now dealing with the question of power. If the county commissioners had the power to contract the indebtedness without a vote of the people, it is valid; if they did not have such power without the vote of the people, it is invalid, no matter whether there was ample time for an election or not.

(f) The amount of the indebtedness incurred has nothing to do with the question. If it is in fact a necessary expense, authorized by the general

laws of the state, there is, under the constitution, no limitation as to amount. It may be quite true, as suggested by the appellees, that the county commissioners might have power to contract debts of considerable size, if necessary. But we fail to see any lurking danger to the county so long as the expenses are limited to such as are necessary to enable the county properly to perform the functions imposed upon it by law. Of course, there is the possibility that the judgment of the county commissioners as to the quality of a thing procured may not always be of the best, but this is a danger that is inherent in the conferring of all political power. If the county continues to use the cruise, it will speedily pay for itself (see Record, page 417). Perhaps it has already done so.

(g) Some point is made on page 114 of the appellees' brief of the statement made by us that the assessor himself cannot be compelled to cruise all the timber lands in Clearwater County. He cannot be so compelled, because he has not the means nor the qualifications. It is a work for experts; the assessor is not required to be a timber cruiser.

(h) We are not unmindful of the rule that this court would be bound by the adjudications of the

Supreme Court of Idaho as to the meaning of its constitution. But an examination of all the decisions of that court, construing the constitutional provision in question, convinces us that this court can derive little assistance therefrom in deciding the question now before it. The decision of District Judge Flinn, referred to by the appellees, on pages 116-117 of their brief, not having been published, we have not had an opportunity to examine it. In any event, being a decision of a lower court, it would not be controlling.

(i) With reference to the appellees' claim that the cruising of United States and state unpatented lands and untimbered lands was not so necessary as to create a necessary expense within the meaning of the constitution, we have nothing to add to what has been said in our opening brief with reference to the United States and state lands.

It is stated by the appellees, on page 65 of their brief, that there is nothing in the record to show the amount of state and government land included in the warrants in this suit. We think we have shown the contrary in our opening brief at pages 83 to 87, where we invite the appellees to show any inaccuracy in our computations. In view of the fact, however, that Nease's work was accepted and

his bills allowed by the board of county commissioners, which constituted at least a stated account between him and the county, the burden is upon the county to show the extent, if any, to which the bills, as allowed, were erroneous.

With reference to the untimbered lands, we would call the attention of the court to the fact that these untimbered lands are openings of comparatively small extent, either caused by burns or natural absence of timber, or clearings throughout the timbered section. Under the terms of his contract, Nease was required not only to cruise the timber but to make reports showing "all openings, burns, marshes. * * *" (See paragraph two of the contract on page 6 of our opening brief.) One of the difficulties which the assessing officers had encountered was in regard to such burns and openings (see the testimony of Harrison, page 303, Zelenka, 361). One object of the cruise was to meet this difficulty and it did so effectively (testimony of Harrison, 303-4, 402-3; testimony of Nease, page 351). As a matter of fact the proper setting off of these burns and openings is more trouble to the cruiser than it would be to cruise them if they had timber on them. (Testimony of Murray, Record, page 379.) In view of the terms of the

contract and the object of the cruise, it is clear that it was contemplated by the parties that these burns and openings should be included by Nease in his reports and that this work was to be included in the contract price of twelve and one-half cents per acre. It is also clear that it was a necessary part of the whole work of supplying to the assessing officers information to enable them properly to classify and assess the lands within the timbered area of the county.

It is common knowledge that there are openings in all timbered tracts, varying in size from small fractions of an acre to several acres. The questions presented by these openings had to be dealt with in a practical way in the execution of the contract; and it was for the commissioners to determine to what extent such openings were within the terms of the contract.

There is no ground for excluding compensation for such lands.

III.

(a) With reference to the objection to the form of the warrants, appellees concede, on page 126 of their brief, that Section 2056 of the Idaho Revised Codes, set out in full on page 91 of our opening

brief, covers the whole subject matter. This section was enacted in 1899, subsequent to the issuance of the warrants which were before this court in the case of *Bingham County vs. National Bank of Ogden,* 122 Federal, 16. The warrants clearly comply with the requirements of this section, and are, therefore, sufficient in form.

IV.

ALLOWANCE OF THE BILLS.

Our claim under this head is not that county warrants are negotiable instruments, nor is the question simply how far the county is bound by the issuance of the warrants: but it is rather how far it is bound by the action of the county commissioners in accepting the work of the contractor and allowing his bills, for which the warrants were issued. As we understand the appellees' argument under this head, it is that some fraud and deceit was practiced upon the board, to induce it to allow these bills. This deceit, it is alleged, consisted of the following facts: first, that Nease included in his bills a charge for cruising some state and United States lands; second, that he included a charge for cruising marshes, burns and townsites; third, that a notation appears on the field report of

one of the cruisers, Archie Young: "These two forties were actually cruised, balance done in camp" (see appellees' brief, 123, 133-134); fourth, that some of the work of some of the cruisers was revised and corrected by Nease before filing the same with the county; fifth, that there was an attempt to conceal the fact that a large part of the lands were single run.

In view of the fact that the District Court in its opinion held that there was no fraud, either in letting the contract or allowing the bills, we take it that it is unnecessary to notice these contentions of the appellees. If, however, this court should see fit to examine into the question, we submit the following:

First: With reference to the government and state lands, there was certainly no deceit practiced upon the county. So far as the United States lands are concerned, it was understood by the county commissioners that Nease was to include in his cruise small isolated tracts of government lands lying within the timbered area. There was certainly no deceit about this (see Record, pages 324, 343, 356, 470).

With reference to state lands, the testimony

is not harmonious. One of the commissioners and the assessor seemed to think that isolated tracts of state lands were to be cruised by Nease the same as government lands (Record, pages 355-421). Nease, however, is of the opinion that whatever state lands were cruised was by mistake (Record, pages 343, 326). If it was a mistake, it was the mistake of the county officers in failing to mark out the state lands upon the maps which were given to Nease showing the lands to be cruised by him (Record, page 325). The lands which Nease was to cruise were designated to him by the county officers (Record, pages 354-5, 394, 419, 421). The state lands are either upon the same footing as the United States lands, or were cruised by mistake. In either event there was no deceit.

Second: With reference to his charging for cruising of burns, openings, marshes and so forth, we beg to say that this is covered by paragraph two of his contract. With reference to the cruising of townsites, appellees have reference to what is known as the Town of Weippe. This consisted of a saw-mill and its appurtenant population, and there was over three million feet of standing timber on the section (Record, pages 351, 298).

We fail to see how there could possibly have been any deceit practiced on the commissioners with regard to the cruising of either the government lands or the burns, openings and the Town of Weippe. All these things appear upon the reports which Nease filed with the county. In fact, the information in regard to these things was compiled by Mr. Becker, one of the counsel for the appellees, from these very reports now on file with the county (Record, page 287). These facts were actually known to the commissioners at the time the bills were allowed (Record, page 355). How could there be any deceit under such circumstances?

Third: With regard to the notation upon Young's field reports, there is no evidence as to who made this notation. It was made neither by Nease, nor by Young (Record, page 244).

Fourth: The revising of some of the work of some of the cruisers was done as a result of the checking of their work by the checkers, and is the usual and proper method of correction (Record, pages 377, 378, 390, 409, 347, 348). That there was no fraud or deceit about it is shown by the fact that these corrections appear on the face of the cruiser's field reports (Record, page 347).

There was in the preparation of the maps some

jibing. The cruisers in making their topographic maps did not use surveyor's instruments to trace out with accuracy the locations of streams, ridges and so forth. Consequently, for example, a stream shown upon one cruiser's topographic sketch of a section might not jibe with a continuation of that stream as shown by the sketch of an adjoining section made by another cruiser, or even by the same cruiser. In making up the permanent maps showing these topographical features, to be filed with the county, a certain amount of jibing was necessary in order to connect up such natural features (Record, page 396). This was a matter wholly insignificant in itself, but proper.

Fifth: There was no attempt to conceal the fact that cruisers were single running (Record, page 472). How could it be concealed with a county checker in the field? In fact, some of the single running was done in the actual presence of a hostile spotter (Record, page 461).

V.

DEFECTIVE WORK.

(a) It is very difficult for us to determine from the appellees' brief what their claim is in regard to defective work. The evidence offered to show defective work was admitted by the trial court for the purpose solely of permitting the defendant county to show, if it could, that the work was so defective that it could not have been honestly accepted by the county. It was admitted as a part of defendants' attempt to show bad faith, and not for the purpose of reviewing the action of the county commissioners in accepting it (Record, pages 234, 245 and 264).

That there was no such fraud was found by the trial court, and will be demonstrated by us in pages following.

There being no fraud, the action of the county commissioners in allowing the bills is conclusive. And in any event, under paragraph seven of the contract, the county is bound to allow Nease the opportunity to make good any defective work. It will have no claim against Nease for any defective work until such opportunity shall have been offered him and he shall have failed to do so. Therefore,

under no aspect of the case, has the county as yet any set-off or counter-claim for defective work. Any such set-off or counter-claim is one that must arise, if at all, in the future against Nease, and cannot be urged against this appellant, who is the assignee of Nease.

North Bergen vs. Eager, 41 N. J. L. 184.

Bush and Howard vs. Cushman, 27 N. J. Eq. 131.

Coster vs. Griswold, 4 Edward's Chancery, 364.

Marling vs. Fitzgerald, 138 Wis. 93, (S. C.) 120 N. W. 388.

VI.

THERE WAS NO FRAUD EITHER IN THE MAKING OR THE PERFORMANCE OF THE CONTRACT.

(a) We take it that it is unnecessary for us to reply to this part of the appellees' brief, in view of the fact that the trial court found that there was no such fraud. In case, however, the court feels it its duty to examine the question, we submit the following:

Most of the appellees' brief on this question consists rather in the reiteration of harsh terms than in the adducing of any proof to justify them.

What the appellees have to say under this heading is scattered through their brief under various disconnected headings, but may be all included under their attempt to show: (1st) fraud in the making of the contract, and (2nd) fraud in its performance.

Before specifically examining the appellees' argument on these points, we cannot refrain from calling the court's attention to the fact that the appellees' statement of what the evidence shows is so frequently one-sided, and at times so distorted, that the reading of the evidence by the court will be sufficient without any remarks from us.

FIRST: *The manner of entering into the contract.*

There is a seeming implication on pages 4 and 5 of appellees' brief that the county commissioners were at fault in entering into the contract with Nease, because of the fact that Judge Flinn had held that a similar contract with Kootenai County was invalid. It appears on page 91 of appellees' brief that Judge Flinn's decision was filed on May 11, 1914, which was long after Nease's second contract with Clearwater County was made.

It is next argued that there was great haste

shown in making the contract. This argument is directed chiefly to the first contract which was subsequently rescinded. However, the evidence is conclusive that the matter had been under consideration for a long time (Record, pages 414, 301, 302). The reason why the assessor insisted upon prompt action was that the time was drawing near when he must commence his assessment work for that year (Record, page 417).

The John Lewis suit is also relied upon as a circumstance showing bad faith (see appellees' brief, pages 14 *et seq*). We shall not add anything to what we have said in our opening brief as to the Lewis suit except to suggest that there is no justification for the appellees' assumption that the county commissioners and Nease were bound to accept as true the extravagant allegations contained in the complaint in that suit and in the affidavits which were attached to the same. As we pointed out in our opening brief, the county commissioners made a thorough investigation of Nease before entering into the contract with him.

SECOND: *Fraud in the performance of the contract.*

The claim of the appellees in this regard is very closely related to their claim that there was

fraud practised upon the commissioners to persuade them to accept the work and allow Nease's bills. It is very difficult at times to determine whether when the appellees are calling attention to certain parts of the evidence they do so in support of one or the other of these claims.

The claim of the appellees seems to be that the manner in which the contract was performed was such as to show that the performance by Nease was but part of a general scheme to defraud the county.

This claim is so closely related to the claim in regard to defective work, as such, that its discussion may entail some repetition. It would serve no useful purpose to attempt to classify the various circumstances which the appellees claimed are proved by the evidence and tend to establish their position. We shall, therefore, notice such of them as we think merit attention, in the order in which we find them in the appellees' brief.

One of the circumstances relied upon by the appellees is the fact that a large part of the lands were cruised by what is called the "single run" method. Appellees' contention in this regard seems to be that a single run method of cruising can, under no circumstances, be of any value. They cite in support of this certain affidavits appearing on pages

73 and 79 of the record. These affidavits are not evidence; they are but exhibits constituting a part of the complaint in the Lewis suit. The testimony of Benjamin Bush (Record, page 292) is cited. This witness says that he knows of nobody else that uses his method of cruising (Record, page 294), and that he has never had any experience with double run cruising (Record, page 293). The testimony of the witness Wherry is also cited (Record, page 271). This witness testified that a complete, accurate and thorough estimate could not be made on a single run cruise. Strictly speaking, this might be said of any cruise. We call the court's special attention to what this witness says in regard to this matter on page 272 of the record. Single run cruising is a well recognized method (Record, 380, 375, 410, 433). The term "single run" does not in itself accurately define any system. There are many systems of single running (Record, 376, 378). For example, Murray, who was a witness for the defendants, testified that his method of single running actually covered a larger proportion of the tract cruised than the double run system of the witness Wherry (Record, 380). The custom is to allow the cruiser to use his own judgment as to whether the particular tract being cruised should be cruised by a double method, or the single run method, or any

other method. (See testimony of Hamer, Record, 431, 432.) The testimony is overwhelming that Nease's cruisers were not instructed by him to single run, but that it was left to their judgment to single run, or double run, or use any other method that their judgment dictated. See testimony of the following witnesses:

Hamer, Record, page 436.
Conry, Record, page 426.
Clark, Record, page 441.
Penegor, Record, pages 443 and 444.
Croman, Record, page 448.
Miller, Record, page 453.
Hart, Record, page 458.
Kelley, Record, page 459.
Olinger, Record, page 459.
Johnson, Record, page 462.
Dockery, Record, page 467.
Nease, Record, page 471.

The fact that there was more single running done in the fall than in the spring is readily accounted for by the fact, as explained by the cruisers, that they became more familiar with the country, and the character of the timber.

Appellees' statement, on page 31 of their brief, that during the fall all the timber was single run, is

not true; there is absolutely no evidence to support this statement. For instance, Snyder, who did most of his cruising in the fall, double run it all (Record, page 457). Johnson double run seventy-five per cent (Record, page 462). Miller double run eighty per cent (Record, page 453); and all cruisers double run when in their opinion it was necessary.

Another circumstance relied upon is that Nease compared the results of his cruise with those of some of the large timber owners. There was no secret about this, and we cannot understand how anyone could think that there was any impropriety in it. No changes were made in Nease's work because of these comparisons (Record, pages 327, 328). The fact that the estimates of one of the companies on some of its land was larger than that of Nease's was explained by the company as being due to the fact that it had been "soaked" by the cruiser under which its estimate had been made (Record, pages 327, 336). Moreover, Nease's estimates as a general thing over-ran those of the company (Record, page 336). It was perfectly proper for the timber owners to acquaint themselves with Nease's cruise, in order to determine whether they would request a re-cruise, as provided by paragraph 6 of Nease's contract.

Appellees call attention to the fact that the cruiser, Archie Young, cruised two sections by doing nothing more than walking up the trail and back again (Record, page 277). It was not possible to procure Young as a witness (Record, page 470). These two sections were 24 and 25. Defendants' exhibits 16 and 17 show that these two sections were burned. This fact is not disputed, and undoubtedly accounts for the manner in which Young covered them.

Some point is made of the manner in which the elevations were taken. It is claimed that they were not taken in all cases according to the instructions given by Nease to the cruisers. (See appellees' brief, pages 49 and 50.) It is immaterial whether these elevations were taken by the cruisers in accordance with Nease's instructions, if they were taken in such a way as to comply with Nease's contract with the county. This contract (see paragraph two) does not require any specific number of elevations to be taken, nor that they be taken in any particular place on a governmental subdivision. The only requirements is that they be taken by means of aneroid barometers. Appellees' objection is that the elevations were not always taken by the cruiser at the exact point where he stood with the

aneroid. This is explained by the following witnesses:

Hamer, Record, page 438.
Penegor, Record, page 446.
Conry, Record, page 430.
Miller, Record, page 455.
Olinger, Record, page 461.

In considering this matter, it must be borne in mind what the purpose of taking elevations was. It was for the purpose only of giving a general idea of the nature of the ground as it would affect logging operations (Record, page 450).

In view of the fact that there were over 500,000 acres of land cruised by Nease' men, and in view of the further fact that all of the original reports turned in by the cruisers to Nease were freely submitted to the representatives of the county for their examination (Record, page 473), the criticisms of the work seem trivial indeed.

Not only does the record fail to show any evidence of fraud, but the reading of it must convince the court that the contract was entered into and performed in the utmost good faith.

Respectfully submitted,

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